

FCC MAIL SECTION

Federal Communications Commission

DA 99-1306

Jul 8 9 59 AM '99

Before the
DISPATCHED BY Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-171
Table of Allotments,)	RM-8846
FM Broadcast Stations.)	RM-9145
(Indian Springs, Nevada, Mountain Pass,)	
California, Kingman, Arizona, and St.)	
George, Utah))	

REPORT AND ORDER
(REVISED)
(Proceeding Terminated)

Adopted: July 2, 1999

Released: July 2, 1999

By the Chief, Allocations Branch:

1. At the request of Claire B. Benezra ("petitioner"), the Commission has before it the Notice of Proposed Rule Making and Orders to Show Cause ("NPRM/OSC"), 11 FCC Rcd 9336 (1996), proposing the substitution of Channel 257C for Channel 257A at Indian Springs, Nevada, and the modification of the construction permit for unbuilt Station KPXC(FM) to specify operation on the higher class channel.¹ To accommodate the allotment of Channel 257C at Indian Springs, the Notice also proposed the substitutions of Channel 259B for Channel 258B at Mountain Pass, California, Channel 261C2 for Channel 260C2 at Kingman, Arizona, and Channel 260C for Channel 259C at St. George, Utah and the modifications of the licenses for Stations KHYZ(FM), KGMN(FM), and KZEZ(FM), respectively. Comments were filed by the petitioner, as well as by New West Broadcasting Systems, Inc. ("New West"), licensee of Station KGMN(FM), Kingman, Arizona, Brawley Broadcasting Company ("Brawley"), licensee of Station KMXX(FM), Imperial, California,² and KHWY, Inc. ("KHWY"), licensee of Station KHYZ(FM),

¹ The Order to Show Cause was directed to the licensees of Station KHYZ, Mountain Pass, California, and KGMN, Kingman, Arizona. An Order to Show Cause to the licensee of KZEZ, St. George, Utah, was unnecessary because it submitted a letter as part of the petition for rule making agreeing to the change in channel.

² Brawley's comments also included what it terms a "counterproposal" to substitute Channel 257B1 for Channel 257A at Imperial, California, and substitute Channel 258C2 for Channel 257C2 at Parker, Arizona. It acknowledges that this pleading may not be acceptable for consideration as a counterproposal herein since the Imperial and Parker channel allotments are not in conflict with, but rather contingent upon, the grant of the proposals under consideration herein. Brawley is correct that absent a conflict with any of the channel changes proposed in the Notice herein, its pleading is not acceptable as a counterproposal. See, Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931, n. 5 (1990). We have, however, considered its pleading as comments in support of petitioner's proposal.

Mountain Pass, California.³ KHWY's comments included what it terms a counterproposal, proposing the substitution of Channel 272C for Channel 257C at Indian Springs.⁴ Reply comments were filed by the petitioner, KHWY, Indian Springs Broadcasting Company ("ISBC") and Calvin J. and Lois A. Mandel ("Madels").

2. A Report and Order, DA 98-689, 13 FCC Rcd 7259 (1998), was previously released in this proceeding. This Report and Order had upgraded Station KPXC(FM) on Channel 257C, had modified the licenses for the Mountain Pass, Kingman, and St. George stations to operate on Channels 259B, 261C2, and 260C, respectively, and had allotted Channel 272C to Indian Springs as an additional, new allotment. However, the Report and Order was subsequently rescinded by an Order, 13 FCC Rcd 14999 (1998), 63 F.R. 14999 (June 1, 1998) within 30 days after public notice of the Report and Order, pursuant to Section 1.113(a) of the Commission's Rules. KHWY later filed a motion for leave to file further comments and submitted further comments.⁵ No other supplementary pleadings were filed.

3. In comments, petitioner reiterates her intention to apply for Channel 257C, if allotted to Indian Springs. She also reiterates her intention to reimburse Stations KHYZ, KGMN and KZEZ-FM (formerly KGSI) for the reasonable costs associated with changing their operating frequencies.

4. Brawley also supports the adoption of petitioner's proposal, stating that if Mountain Pass Station KHYZ moves to Channel 259, its Station KMXX at Imperial, California, could upgrade from its present Channel 257A to Channel 257B1. It recognizes that the allotment of Channel 257B1 at Imperial is contingent upon, rather than in conflict with, the grant of petitioner's proposal, and, as such, may not be acceptable for consideration as a counterproposal herein, citing Milton, West Virginia and Flemingsburg, Kentucky, 11 FCC Rcd 6374 (1996). However, it states that in an abundance of caution, it is submitting the proposal to substitute Channel 257B1 for Channel 257A at Imperial. To accommodate the allotment at Imperial, Brawley also proposes the substitution of Channel 258C2 for Channel 257C2 at Parker, Arizona, and the modification of Station KVEZ's license accordingly. Brawley states that Channel 258C2 can be allotted to Parker at Station KVEZ's licensed site and Channel 257B1 can be allotted to Imperial at the site specified in Station KMXX's outstanding construction permit (BPH-960408IB). It also commits to reimbursing Station KVEZ for the costs associated with its change

³ Comments were filed by KHWY (California), L.P. However, on October 18, 1996, pursuant to Commission approval, KHWY (California), L.P. assigned the license for Station KHYZ to KHWY, Inc., the general partner of KHWY (California), L.P. Thus, KHWY, Inc. is now the licensee of Station KHYZ and, as such, filed its reply comments under the name of KHWY, Inc.

⁴ As discussed *infra* at para. 14, this proposal is not technically a counterproposal. However, Public Notice of the filing of this alternative channel was given on July 28, 1997, Report No. 2213, Mimeo 75517.

⁵ In its motion, KHWY requests acceptance of its further comments in order to correct engineering material contained in the Report and Order regarding the coverage area of Station KHYZ(FM), Mountain Pass. We will accept KHWY's pleading in order to resolve this case upon a complete and accurate record.

of channel.

5. KHWY agrees with the allotment of a Class C channel to Indian Springs since it could provide service to a substantial "white area" but opposes the modification of Station KHYZ's license to Channel 259B. It argues that the proposal advanced by the petitioner is not the most efficient method of accomplishing this goal. KHWY contends that allotting Channel 272C, instead of Channel 257C, to Indian Springs would result in greater "white area" coverage while not requiring any station to change its channel. It states that the allotment of Channel 272C, at coordinates close to those proposed by the petitioner, would result in the provision of a first fulltime aural service to an area 70 percent larger and with twice as many residents.⁶ Specifically, it states that on Channel 272C, Station KPXC would provide a first service to a "white area" encompassing 14,832 square kilometers, with a population of 3,193 persons, as compared to a "white area" service on Channel 257C covering 8,647 square kilometers with a population of 1,549 persons. Because KHWY proposes a non-adjacent channel upgrade for Station KPXC, it points out that Channel 276C is available for allotment should an interest be expressed in Channel 272C at Indian Springs.

6. KHWY states that the Commission has recognized that channel substitutions impose a burden on licensees and cause inconvenience for listeners and thus permits such substitutions only upon a finding that these disruptions are justified by public interest benefits, citing Blair, Nebraska, 8 FCC Rcd 4086, 4087 n.8 (1993). KHWY contends that it would be contrary to the public interest to change Station KHYZ's frequency because, along with its sister station, KRXV(FM), at Yermo, California, the station provides a "unique" safety service for travelers across the Mojave desert. KHWY is concerned that Station KPXC, operating as a high powered Class C station only two channels removed from its Mountain Pass station would result in interference to its signal. It submits that the Commission agreed with KHWY's recognition of the unmet need of millions of yearly travelers along Interstate 15 for 24-hour access to road, weather and emergency information when it approved the allotments, citing Yermo and Mountain Pass, California, 45 RR 2d 58 (1979). It contends that the "critical" role which these stations play is further evidenced by the signs which the Nevada Highway Department has placed along Interstate 15 instructing motorists to tune to their stations for emergency, highway and weather information and the waiver which the Commission granted in 1985 allowing Station KHYZ to operate at "superpower" status.⁷ KHWY asserts that changing Station KHYZ's frequency would

⁶ The coordinates proposed by KHWY in its counterproposal are 36-31-00 NL; 115-59-35 WL, which represents a site 20 kilometers (12.1 miles) northwest of the site proposed by the petitioner.

⁷ Station KHYZ is said to operate with superpower status because its 1.0 mV/m service contour extends beyond the Class B reference distance of 52.2 km, which is achieved by using the Class B maximum ERP of 50 kW and the reference HAAT of 150 m. Pursuant to a waiver request, the Commission permitted Station KHYZ to increase its facilities from 2.3 kW at 521 m to 10 kW at 522 m. See File No. BPH-820714AB. This waiver grant allowed Station KHYZ to extend its 1.0 mV/m contour from 49.0 km to 63.6 km, beyond the 52.2 km Class B reference distance. Station KHYZ currently provides service to 63.6 km, but with slightly altered facilities: 8.4 kW at 551 m. See File No. BLH 960313KB.

cause the millions of travelers to experience confusion and undermine the safety services which they have come to rely on. No such confusion would occur if Station KPXC at Indian Springs is modified to operate on Channel 272 instead of 257 because the station is not constructed and thus is not on the air. Therefore, it urges the adoption of its proposal which will enable Station KPXC to achieve Class C status while also not imposing an unnecessary burden on three other stations.

7. New West also opposes the modification of its license for Station KGMN at Kingman. It supports the counterproposal submitted by KHWY and incorporates by reference the technical showing accompanying the counterproposal.

8. KHWY, in reply comments, reiterates that its proposal to substitute Channel 272C for Channel 257A at Indian Springs would better serve the public interest than petitioner's proposal because it can provide service to a larger and more populous "white area" without requiring three other stations to change channel. It also opposes the acceptance of Brawley's proposal to upgrade Station KMXX at Imperial and substitute channels at Parker, Arizona. Rather than being a counterproposal, KHWY states that it is contingent upon the grant of petitioner's proposal and thus cannot be considered in this proceeding, citing Milton, West Virginia and Flemingsburg, Kentucky, supra, Wilmington, North Carolina, 6 FCC Rcd 6969, 6971 (1991), and Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, supra. Further, it states that Brawley's proposal is fatally flawed even if the Commission were to accept Brawley's proposal in this proceeding. KHWY points out that Commission policy requires all parties in a proceeding which benefit from another station changing channel to share in the reimbursement of the costs associated with such a channel change. To this end, Brawley, as a beneficiary of the change in channel by KHYZ, has failed to state its intention to reimburse KHWY for the cost of changing channel even though it did state such an intention with respect to Station KVEZ at Parker. In addition, KHWY notes that the allotment of Channel 257B1 at Imperial would be short-spaced to two Mexican stations in violation of Section 73.207(b)(3) of the Commission's Rules. Although it recognizes that restricted allotments are permitted under the U.S.-Mexican Agreement, Brawley has not shown whether it can provide the interference protection to the two Mexican stations. Finally, it states that Brawley's proposed upgrade at Imperial can be accomplished without requiring Station KHYZ to change channel since there are four channels which can be assigned to Station KVEZ at Parker that would accommodate the Imperial proposal without requiring any other changes.

9. Petitioner, in reply comments, disputes the harm which KHWY states will be caused if its Station KHYZ changes its operating channel from 258B to 259B. First, petitioner states that her proposal complies with Commission policy set forth in Columbus, Nebraska, 59 RR 2d 1184 (1986), regarding rule makings which require three or more stations to change channel since only two stations will be required to involuntarily change channels. The licensee of Station KZEZ at St. George, Utah, has agreed to the modification of the station's license to specify Channel 260C. Next, she contends that there should be little disruption to Station KHYZ's listeners if they have to tune in a different frequency since KHWY states that the primary aim of the station is to serve the highway travelers who pass through the area rather than local

residents who may have set their radio push buttons to the station's present frequency. Thus, she sees no difficulty in a listener tuning to the station on 99.5 MHz instead of its present 99.3 MHz. Further, petitioner has stated her willingness to reimburse Station KHYZ for the reasonable costs associated with its change of channel and she states that this would include the costs of altering billboards and other signs to inform the public of the station's new frequency. As to KHWY's concern over interference from Station KPXC if modified to a frequency only two channels away, she points out that the allotment can be made in compliance with the Commission's minimum distance separation requirements and that the only interference protection which stations are entitled to are those arising from the mileage separation requirements.

10. Petitioner points out that KHWY's counterproposal was not advanced to provide for a new station or an upgrade of an existing station. Rather, she argues that the only reason the proposal was advanced was to avoid having to change, by even one channel, its presently authorized frequency. However, in proposing the allotment of Channel 272C to Indian Springs, KHWY has had to utilize a proposed transmitter site different from the one proposed in the petition for rule making. She argues that while KHWY has selected a theoretically acceptable site, no demonstration was made that the proposed reference site is available and suitable other than to show that the site complies with the Commission's minimum distance separation and city-grade service requirements. Because the site identified by KHWY is at the minimum permitted distance from Station KFMS-FM at Las Vegas, Nevada, petitioner submits that she will be severely limited in moving the proposed transmitter site in a southeasterly direction. She does not dispute that the transmitter site proposed by KHWY would serve a greater white area but contends that such a factor is only relevant when the Commission is comparing competing proposals put forth by competing petitioners. If KHWY were proposing a new allotment to a different community, she states that the proper comparison would be between the site proposed by the existing licensee for its upgrade and the theoretical site for the new allotment. However, she argues that this is not the case here. Rather, KHWY does not propose to operate a station from the proposed site and provides no description of the site other than providing the coordinates. In this respect, while it appears from KHWY's showing that a large area exists where a Channel 272C transmitter could be sited and provide city-grade coverage, it does not take into account a number of areas that are excluded as possible sites, including the Nevada Test Site, Nellis Air Force Range, the Ash Meadows National Wildlife Refuge and the Desert National Wildlife Range. The need for an unobstructed line-of-sight from the transmitter site to Indian Springs also limits the choice of transmitter sites. Thus, she claims that the available transmitter site area is limited to an area comprising 264 square kilometers while the available transmitter site area for Channel 257C is 992 square kilometers. She also points out that in light of the two expressions of interest which were filed for Channel 272C at Indian Springs, the Commission may be assured that the "white area" will be served by a station without forcing petitioner to move her station to a channel and location of no interest to her. Petitioner further states that it is well established Commission policy to allot channels with the least site restriction possible in order to provide greater flexibility in selecting transmitter sites, citing Vacaville, CA, 4 FCC Rcd 8315 (1989), recon. den., 6 FCC Rcd 143 (1991). Here, the allotment of Channel 257C at Indian Springs requires a site restriction of 21.2 kilometers southwest while the allotment of Channel 272C and 276C require a site restriction of 30 kilometers west. Thus, she states that the site

restriction required to accommodate either of these channels would reduce the total practical permissible site area by 73% from that available for Channel 257C.

11. Assuming that it is proper to compare KHWY's proposal with that of petitioner's, she states that her proposal should still be granted. Petitioner provides an engineering study disputing the population gain showing made by KHWY. She states that the assumed facilities for Class C allotments is 100 kW at 300 meters HAAT but that KHWY used maximum facilities of 600 meters HAAT.⁸ She states that the assumed transmitter sites proposed by both her and KHWY are above 300 meters HAAT. Therefore, her engineer has assumed an antenna centerline height of 30 meters above ground for purposes of coverage calculations. Based on these facilities, petitioner states that a Class C station operating from the site proposed by KHWY would provide service to only 10,393 people while her proposal would provide service to 635,134 people, for a difference of 624,741 persons. Further, if the upgrade of Station KMXX at Imperial is factored into the equation, the total number of additional people will rise to 637,747 over that proposed by KHWY. Thus, she contends that her proposal clearly will be serve the public interest.

12. In response to the counterproposal Public Notice, ISBC and the Mandels each filed comments stating their intention to apply for Channel 272C, if allotted to Indian Springs.

13. After the release and rescission of the Report and Order in this proceeding, KHWY submitted further comments. Therein, KHWY contends that the Report and Order misstated the coverage area for its Station KHYZ(FM), Mountain Pass, CA, and did not fully protect that service area from operation of Station KPXC(FM) on upgraded Channel 257C, Indian Springs, CA. In support of this position, KHWY reiterates that the Mountain Pass station was expressly granted a waiver of Section 73.211 of the Commission's Rules to operate at power in excess of the standard Grade B maximum in order to provide specialized service to travelers on Interstate 15 in the Mojave Desert. However, citing paragraph 15 of the Report and Order, KHWY argues that the rescinded decision did not fully protect that enhanced service, relying upon Ludlow, CA, 10 FCC Rcd 563 (1995) (grandfathered superpower stations are not due protection above the maximum Class B limits set forth in Section 73.211 of the Commission's Rules). KHWY argues that its Mountain Pass station is not a grandfathered, superpower station but rather is an intentionally authorized, superpower facility by the grant of a waiver request. KHWY asserts that this distinction is important because, citing Las Piedras, PR, 87 FCC 2d 1011(1981), it believes that the Commission has held the generally applicable minimum separation rule has been rendered inapplicable by the grant of a waiver of a rule and should, therefore, afford protection to the additional service area that its station is permitted to serve due to the grant of the waiver.

⁸ See Greenup, Kentucky, 4 FCC Rcd 3843 (1989).

Discussion

14. As a threshold matter, we make several observations. First, while KHWY styled its initial pleading in this proceeding as "Comments, Counterproposal and Response to Order to Show Cause," the proposal to upgrade the Indian Springs station on Channel 272C instead of the requested Channel 257C is not a counterproposal. In this regard, it is well established under our precedent that "a counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." 5 FCC Rcd 931 n.5 (1990). Since Channel 272C at Indian Springs is not in conflict with any of the NPRM/OSC's proposed allotments, it is not technically a counterproposal. Rather, it is a suggestion for an alternative channel for Indian Springs that we can consider or reject as an upgrade channel for the Indian Springs station. Further, we disagree with the petitioner that it is improper to consider KHWY's suggestion to allot Channel 272C at different coordinates instead of Channel 257C at Indian Springs since KHWY does not intend to apply for the channel. While the Commission will not force an existing station to relocate its transmitter site to accommodate an allotment elsewhere, petitioner proposed in her petition to have Channel 257C allotted to Indian Springs at coordinates different from that specified in the station's outstanding construction permit. Thus, since the petitioner has indicated her willingness to relocate Station KPXC should it be upgraded to a Class C, the imposition of a different transmitter site falls within the Commission's existing policy to impose a different site restriction to accommodate an allotment elsewhere. See, Rockport, Gregory, Alice and Armstrong, Texas, 4 FCC Rcd 8075 (1989) (permittee or licensee that seeks a higher class channel which requires a new transmitter site cannot invoke policy against an involuntary transmitter site move if the move is needed to accommodate its request for an upgrade and a number of other mutually exclusive requests for upgrade).

15. Second, the basis for the estimates of coverage predictions for Class C authorizations or allotments must conform to Commission rules and practice. As the Commission has stated on numerous occasions, maximum facilities for each class of FM station should be employed for allotment purposes. See Greenup, supra note 8. For Class C stations, however, we recognize an exception. To determine the extent of service or coverage of Class C stations and construction permits, actual facilities are assumed. For vacant allotments, the Class C minimum facilities of 100 kilowatts and 300 meters HAAT are assumed. Accordingly, in analyzing the coverage areas for the proposed allotment at Indian Springs, as well as for all other authorizations and allotments, we have followed these guidelines.

16. We also note that Benezra and KHWY used in their engineering analyses distinctly non-circular coverage areas, apparently modified from the circular by taking into account terrain variations. Section 73.313 of the Commission's Rules requires that all predictions or determinations of coverage use the Commission's standard propagation methodology, the F(50,50) curves, which assume uniform or "average terrain." Because at the allotment stage, the ultimate location of the transmitter site is generally unknown, we do not know the specific terrain along

any given signal path.⁹ Accordingly, we assume uniform terrain in determining coverage and predict the distance from a theoretical reference site to the 1.0 mV/m service contour given the effective radiated power ("ERP") and the nominal or reference antenna height above average terrain ("HAAT") for the class of station. This yields a coverage area that is perfectly circular. Therefore, we question the appropriateness of Benezra and KHWY's use of contours that apparently take into account terrain differences that restrict the 1.0 mV/m signal coverage to less than perfectly circular coverage at the allotment stage. We have assumed, for resolution of this case, uniform terrain, which results in a circular coverage area.

17. We agree that the public interest would be served by upgrading the Indian Springs station to a Class C channel because it could serve a much greater population than it could as a Class A channel. However, the question is whether to upgrade the station on cochannel 257C or nonadjacent channel 272C. Our revised engineering analysis, using minimum Class C facilities, circular coverage areas, and U.S. Census population data reveals that Priorities (1) and (2), first and second full-time reception services, are not decisionally significant. While Channels 257C and 272C would theoretically provide a first full-time reception service to areas of 2,144 and 4,380 square kilometers, respectively, these areas are uninhabited. Likewise, while Channels 257C and 272C would provide a second full-time reception service to areas of 1,000 and 2,679 square kilometers, respectively, the populations within these areas are the same -- 62 people. Furthermore, Priority 3, first local transmission service, is not involved in comparing these two channels because Station KPXC(FM) is already authorized at Indian Springs. Consequently, our comparison must be made under Priority 4, other public interest matters.

18. Under Priority 4, we believe that choosing between these alternate channels is similar to comparing competing upgrade proposals, under which the chief basis for comparison is generally population coverage. See Greenup, KY, *supra* note 8. Here, Benezra's proposed Channel 257C would serve 542,758 persons due to coverage of a significantly sized portion of Las Vegas and its surrounding area. By way of contrast, Channel 272C would only serve 26,244 persons. Since Channel 257C would serve twenty times more people than would Channel 272C, Channel 257C is more desirable from a public interest standpoint.

19. Balanced against the selection of Channel 257C for the Indian Springs' upgrade is KHWY's concern that its Station KHYZ(FM) at Mountain Pass would have to operate on Channel 259B instead of its current Channel 258B and that it would, therefore, apparently lose the benefit of its waiver to operate in excess of maximum Class B facilities. As we indicated earlier, Station KHYZ(FM) provides service to an additional 14.6 kilometers beyond what a normal Class B station could serve using maximum facilities. In view of KHWY's allegations of interference and the fact that its Station KHYZ(FM) was granted a waiver of Section 73.211

⁹ The Commission, however, may permit the use of the F(50,50) curves along a single radial or even the use of an alternate propagation methodology where site suitability is highly problematic and factors such as severe terrain or other factors essentially limit site availability to a single location. See Creswell, Oregon, 4 FCC Rcd 7040 (1989) and Woodstock and Broadway, Virginia, 3 FCC Rcd 6348 (1988). No showing has been made to warrant the use of other than circular coverage areas.

to operate in excess of maximum Class B facilities to serve portions of Interstate 15 in the Mojave Desert, we have undertaken an engineering analysis to determine whether Station KHYZ(FM) could operate with its current superpower facilities on Channel 259B in lieu of Channel 258B without interfering with upgraded Station KPXC(FM) at Indian Springs on Channel 257C. Our analysis shows that no interference would occur. Specifically, we have determined that the interfering contour (94 dBu) from the Indian Springs station (using minimum Class C facilities) does not overlap the protected contour (54 dBu) of Station KHYZ(FM) at Mountain Pass using superpower facilities. Likewise, the interfering contour (100 dBu) from the Mountain Pass station using superpower facilities would not overlap the protected contour (60 dBu) of the Indian Springs station. Moreover, no overlap of the interfering and protected contours would occur even if we assume the use of maximum facilities for Channel 257C at Indian Springs. KHWY's allegations of interference appear to be based upon the use of a more stringent standard for determination of interference than specified by the Commission's Rules.¹⁰

20. Since no interference would occur, we believe that the optimum result in this case is to upgrade Station KPXC(FM) at Indian Springs on Channel 257C and to modify the license for Station KHYZ(FM) at Mountain Pass to operate on Channel 259B with the same superpower facilities that it currently has on Channel 258B. Such a result permits the Indian Springs station to serve a much greater number of listeners than would be possible on nonadjacent Channel 272C¹¹ and, at the same time, preserves the public interest benefits flowing from the prior grant of Station KHYZ(FM)'s waiver of Section 73.211 of the Commission's Rules.

21 As a final matter, even though two expressions of interest were filed for an additional Class C allotment at Indian Springs, we will not allot either Channel 272C or Channel 276C to Indian Springs in this proceeding. Such an allotment would have been permissible if we had upgraded Station KPXC(FM) at Indian Springs on a nonadjacent channel. Section 1.420(g)(2) of the Rules permits, in the course of upgrading one station on a nonadjacent channel, the allotment of an additional equivalent channel to accommodate other expressions of interest in the upgraded, nonadjacent channel. The rules allows this additional allotment to satisfy requirements established in Ashbacker Radio Corp. FCC, 326 U.S. (1945) that had been applied to upgrades. See Cheyenne, Wyoming, 62 FCC 2d 63 (1976) and Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses, 98 FCC 2d 916, 919-20 (Comm. 1984). However, having decided to upgrade Station KPXC(FM) on cochannel 257C, it is beyond the scope of this proceeding to allot either nonadjacent Channels 272C or 276C to Indian Springs because these channels do not conflict with any of the channels proposed in the

¹⁰ Instead of +40 dB as specified by Rule Section 73.215(a)(2), KHWY apparently used the more stringent +20 dB as the protection ratio for Channel 259B, the second adjacent channel to the proposed channel 257C. The protection ratio of +20 dB is no longer the protection ratio for second adjacent commercial channels, but it remains the proper ratio for second adjacent educational FM channels. See Amendment of Part 73 of the commission's Rules to Permit Short-Spaced FM Assignments by Using Directional Antennas, 6 FCC Rcd 5356 (1991).

¹¹ In view of our decision to upgrade Station KPXC(FM) on Channel 257C, it is not necessary to address Benezra's arguments regarding site suitability and availability for Channel 272C at Indian Springs.

NPRM/OSC and because there has been no opportunity for the filing of counterproposals to these channels. Accordingly, the parties that expressed interest in an additional Class C allotment at Indian Springs should file a rulemaking petition to seek such an allotment if they still have an interest to do so.

Technical Summary

22. Channel 257C can be allotted to Indian Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.2 kilometers (13.2 miles) southwest to accommodate petitioner's desired transmitter site. Channel 261C2 can be allotted to Kingman, Arizona, at Station KGMN's licensed transmitter site. Channel 260C can be allotted to St. George, Utah, at Station KZEZ's licensed transmitter site. Channel 259B can be allotted to Mountain Pass, California, at Station KHYZ's licensed transmitter site.¹² Concurrence by the Mexican government in the allotments at Kingman and Mountain Pass have been received since both communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border. The concurrence for Channel 259B at Mountain Pass includes the use of their current superpower facilities.

23. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Claire B. Benezra for Station KPXC, Indian Springs, Nevada, IS MODIFIED to specify operation on Channel 257C, in lieu of Channel 257A, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

24. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KHWY, Inc. for Station KHYZ, Mountain Pass, California, IS MODIFIED to specify operation on Channel 259B in lieu of Channel 258B and to use their current, Class B superpower facilities (8.4 kilowatts effective radiated power and antenna height of 551 meters above average terrain), the license of New West Broadcasting Systems, Inc. for Station KGMN, Kingman, Arizona, IS MODIFIED to specify operation on

¹² The coordinates for Channel 257C at Indian Springs, NV, are 36-25-18 NL; 115-48-35 WL. The coordinates for Channel 261C2 at Kingman, AZ, are 35-06-37; 113-52-55. The coordinates for Channel 260C at St. George, UT, are 36-50-49; 113-29-28. The coordinates for Channel 259B at Mountain Pass, CA, are 35-29-27; 115-33-27.

Channel 261C2 in lieu of Channel 260C2, and the license of KZEZ, Inc. for Station KZEZ, St. George, Utah, IS MODIFIED to specify operation on Channel 260C in lieu of Channel 259C, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KHYZ's license, BLH-960313KB, Station KGMN's license, BLH-901120KG, or Station KZEZ's license, BLH-941123KE, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-891120KG, BLH-960313KB and BLH-941123KE, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

25. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following licensees, as follows: KHWY, Inc., Station KHYZ, P.O. Box 25606, Los Angeles, CA 90025; New West Broadcasting Systems, Inc., Station KGMN, 812 East Beale Street, Kingman, AZ 86401; KZEZ, Inc., Station KZEZ, P.O. Box 1450, 210 N. 1000 East, St. George, UT 84771-1450.

26. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective August 16, 1999, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Kingman, Arizona	234C, 261C2, 290C1
Mountain Pass, California	259B
Indian Springs, Nevada	257C
St. George, Utah	228A, 240C, 260C

27. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

28. For further information concerning this proceeding, contact Andrew J. Rhodes and J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**